Supreme Court of the United States

OCTOBER TERM, 1947

No. 184 - 189

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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New York, New York, July 2, 1947.

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The Chicago, Rock Island & Pacific Railway Company, debtor in the above proceedings for its reorganization under Section 77 of the Bankruptcy Act, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

entered February 21, 1947, which judgment reversed an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 28, 1946, directing that the plan of reorganization of the debtor and its debtor subsidiaries should not be confirmed and that the case should be referred for further proceedings to the Interstate Commerce Commission pursuant to Section 77 (e) of the Bankruptcy Act, and to review the order of said Circuit Court entered April 7, 1947, denying the debtor's petition for a rehearing.

Opinions Below

The opinion of the district court (R. 249-53) has not yet been reported. That of the Circuit Court of Appeals (R. 332-43) is reported in 160 F. 2d 942.

Jurisdiction

The judgment of the circuit court of appeals was entered February 21, 1947 (R. 344-52), and its denial of the debtor's petition for rehearing was entered on April 7, 1947 (R. 354). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, which is made applicable by Section 24 (c) of the Bankruptcy Act.

The three months' period limited by 28 U. S. C. § 350 within which a petition for certiorari must be filed does not commence to run until denial of a petition for rehearing. *United States* v. *Seminole Nation,* 299 U. S. 417 (1937); *Department of Banking* v. *The Pink,* 317 U. S. 264 (1942); *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498 (1927).

Question Presented

The two *Denver* cases (328 U. S. 495 and 329 U. S. 607) delineated the conditions under which a district court in reorganization proceedings under Section 77 may confirm a plan despite its being rejected by one or more classes of

creditors. This case presents the cognate and equally important question: Under what circumstances may a district court refuse to confirm a plan which has been rejected by one or more classes of creditors?

Statute Involved

The pertinent provisions of Section 77 of the Bankruptcy Act, 47 Stat. 1474 (1933), as amended 49 Stat. 911 (1933) and 49 Stat. 1969 (1936), 11 U. S. C. § 205, are set forth in the Appendix, *infra*, pp. 33-37.

Statement

The plan of reorganization of the debtor was approved by the Interstate Commerce Commission on May 1, 1944, and approved by the district court on June 15, 1945. Subsequently, the district court directed the Commission to submit the plan for acceptance or rejection to eleven classes of creditors. On February 26, 1946, the ICC certified to the court that the plan had been rejected by two classes of creditors: The holders of the Little Rock & Hot Springs Western First Mortgage Bonds, by an adverse vote of over 80% (class 21-A, R. 98; also R. 243), and the holders of the Convertible 4½ Bonds, by an adverse vote of over 75% (class 14, R. 96; also R. 243). The Convertible bondholders are an unsecured group. Under the rejected plan, with the value of each share of new common stock taken to be $50 (the value assumed in allotting such shares under the plan to the holders of old senior bonds), the claims of these Convertible bonds, aggregating $47,297,168 as of January 1, 1944, after deduction of cash paid, were recognized only to the extent of $8,003,907—17% of the amount of their claims.

After certification by the ICC that the plan had been rejected, the district court held a hearing on confirmation, and on June 28, 1946, decided that conditions affecting the

debtor had not been anticipated correctly, that their unforeseen change warranted a reconsideration of the plan by the Interstate Commerce Commission, and that the aforesaid two classes of bondholders had acted reasonably in rejecting the plan.

In the memorandum opinion of the district court it was stated (R. 252):

> "In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.
>
> "Against that we find the Debtor today with cash or equivalent of over $70,000,000; with an R. F. C. loan aggregating, principal and interest in excess of $18,000,000 paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original plan have disappeared—the banks, the R. F. C., and the Peoria Railway Terminal Co.
>
> "The above recital does not take into account the tremendous sums expended over the period on improvement of road and equipment, nor does it include the retirement of debt on jointly owned facilities such as the Joliet and Denver terminals."

The district court in its order denying confirmation (R. 254-5) concluded "(a) that the Plan does not make adequate provision for fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds, (b) that the rejection of the Plan by the holders of the Convertible Bonds was reasonably justified in the light of the respective rights and interests of the holders of the Convertible Bonds and all the relevant facts, (c) that the Plan does not conform to the requirements of clause (1) of

the first paragraph of subsection (e) of Section 77 of the Bankruptcy Act, as amended, in respect of its treatment of the Convertible Bonds, and (d) that the Plan should not be confirmed." (R. 254-5.)

Senior bondholder groups, largely composed of banks and institutional investors, appealed (R. 258-77) from the district court's order refusing confirmation and referring the case to the ICC for reexamination, and on February 21, 1947, the Seventh Circuit Court of Appeals reversed the district court, vacating its said order and directing it to confirm the plan (R. 344-52).

The circuit court erroneously assumed that this Court in the *Denver* cases* held that a district court is compelled to exercise its "cram-down" power, despite the adverse votes of classes of creditors, in every case in which the district court or an appellate court has held, by approving the plan, that it was fair and equitable; thus failing to note that the statute in no event *requires* use of the "cram-down" power, but only *permits* it, and then only after the district court affirmatively finds (1) that the plan is fair and equitable in the light of changed conditions and (2) that the rejection was not reasonably justified in the light of all the relevant facts.

Citing the first *Denver* case, the circuit court said, "Thus it is clear that the court's discretion [under Section 77(e)] is not unlimited, but is circumscribed, and until the statute is satisfied, no discretion is vested in the court"—to confirm the plan, the circuit court should have added. (R. 336, 160 F. 2d 942, 945.) Instead, the court used the quoted sentence—which is the major premise of the *Denver* cases—to deny the district court any discretion to do otherwise than "cram-down" the rejected plan by confirmation, despite adverse class votes, solely because the plan had previously been approved by the Commission and district court.

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* 328 U. S. 495; 329 U. S. 607.

The circuit court's opinion further misapplied the *Denver* cases:

> "Regarding changed economic conditions after approval of a plan (which is the nub of our problem), the Supreme Court said: 'Changes in economic conditions cannot effect the powers of the reorganization agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers.' [First *Denver* case] 328 U. S. 512, 66 S. Ct. 1291. *To us this statement means that changes in economic conditions cannot be used as a wedge to have the Commission reexamine its former valuation figures.* This quoted statement would appear to be conclusive of our problem, since this court examined the plan in the manner prescribed in *Ecker* v. *Western Pacific RR.*, 318 U. S. 448, and *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. R.*, 318 U. S. 523, and by affirming the order approving the plan, established that the plan was fair and equitable" (160 F. 2d 942, 947). (Emphasis supplied.)

Despite the Supreme Court's clear statement to the contrary, the circuit court used that very statement to hold that as a matter of law unanticipated changes in financial conditions subsequent to approval of a plan are not a basis for a refusal of confirmation and a reexamination of the present fairness of the plan. So to hold obviously renders confirmation a mere form which may well be dispensed with entirely.

In the circuit court's entire opinion, no attempt was made to consider the new facts presented to the district court by the debtor or to rebut any of the debtor's arguments, nor in fact was any mention made of them although they had been fully briefed and argued to the court.

After entry of the circuit court's order of reversal, the debtor applied to the district court for a stay of confirmation pending the filing of the present petition for a writ

of certiorari. This application was denied on the ground that the district court did not have authority to grant such relief. A motion made by the debtor to the circuit court to recall its mandate and stay further proceedings until the Supreme Court should have passed upon the instant petition was denied on May 20, 1947. In accordance with the mandate of the circuit court, the district court confirmed the plan on May 23, 1947.

Reasons for Granting the Writ

The circuit court considered—and the debtor agrees—that the basic question before it was whether under Section 77(e) the district court was justified in refusing to confirm the rejected plan of reorganization. It is the debtor's position that in holding the district court to be without discretion to refuse confirmation under the circumstances here existing, the circuit court erroneously construed Section 77(e) and mistakenly applied the *Denver* cases.

POINT I

The District Court possesses plenary discretion to order the reexamination of a plan after such plan has been rejected by vote of one or more classes of creditors.

Section 77(e) provides that the district judge "*shall*" confirm the plan if accepted by a two-thirds vote of each class of creditors and by a majority vote of each class of stockholders entitled to vote upon confirmation. If any class entitled to vote fails to accept by the required vote, the judge "*may* NEVERTHELESS" confirm the plan if he is "satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights

and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)".

An analysis of these provisions shows:

1. The judge *must* ("shall") confirm the plan if accepted by the necessary votes of all classes of creditors and stockholders entitled to vote.

2. Normally, rejection by vote of any class entitled to vote will result in a failure of confirmation.

3. However, the judge "*may*" in his discretion,* "*nevertheless*" (despite the adverse vote) confirm a plan which has been rejected by an adverse vote, but only "if he is satisfied" [is convinced**] and "finds, after hearing" that *each* of the following conditions is met:

(a) the plan "makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it";

(b) the "rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts"; and

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* "And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See United States v. Thomas, 156 U. S. 353, 360." *Anderson* v. *Yungkau*, 329 U. S. 482, 485.

** "To 'satisfy' is 'to free from doubt, perplexity, or suspense; to set the mind at rest; to convince;' and one of the synonyms given is to 'convince the understanding'. While one person may be satisfied of the truth of a matter upon a mere scintilla of evidence, and another require that all doubt be removed before it is shown to be true to his satisfaction, it cannot be said that one is satisfied—that his understanding is convinced—of the truth of the matter in respect of which he entertains a reasonable doubt." *Rolfe* v. *Rich*, 149 Ill. 436, 439.

(c) the plan "complies with the provisions of subsection (b) of this section [section 77], is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" [section 77(e)].

4. If the plan has been rejected by the vote of any class of security holders whose vote is required, and if the judge has *any* doubt as to *any* matter referred to in subparagraphs (a), (b) and (c) of the preceding paragraph hereof, the judge *must* ["shall"] "enter an order in which he shall either dismiss the proceedings, or, in his discretion • • • refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans" [section 77(e)].

5. Even if the judge is personally convinced of the existence of the facts which vest in him the power to confirm the plan despite adverse class rates, he is not *required* to confirm; he "may", in his discretion, nevertheless refer the plan to the Commission for further consideration.

The judicial power given in Section 77 to confirm a plan under which dissenting classes of creditors may be compelled to take long term bonds or shares of stock is unique. This power was *not* possessed by the court in a "composition" agreement with a bankrupt under the old Bankruptcy Act.[1] The power is *not* possessed by the court: in an equity receivership[2]; a proceeding for an Agricultural Composi-

[1] Under old Section 12(b) the court could not consider confirmation of the proposed "composition" unless it had been accepted in writing by a majority in number of creditors holding a majority in amount of claims.

[2] Dissenters are entitled to receive in cash their pro rata portions of the net proceeds of a sale of the debtor's property. *Guaranty Trust* v. *Seaboard*, 60 F. Supp. 607, 615; *Coriell* v. *Morris White*, 54 F(2d) 255, 260.

tion and Extension under Section 75 of the Bankruptcy Act[3]; a proceeding for the Composition of Municipal Indebtedness under Chapter IX of the Bankruptcy Act[4]; proceedings for Corporate Reorganizations under Section 77B or Chapter X of the Bankruptcy Act[5]; a proceeding for an Arrangement under Chapter XI of the Bankruptcy Act[6]; a proceeding for a Real Property Arrangement under Chapter XII of the Bankruptcy Act[7]; or a proceeding for a Wage Earners Plan under Chapter XIII of the Bankruptcy Act.[8] Prior to amendment of the Section in 1935, the court did not have the power in a proceeding under Section 77.

Under the English reorganization statute, a "scheme of arrangement" may be confirmed only after it has received the assent in writing of "three-fourths in value" of the claims of each class (The Railway Companies Act, 1867, 30 and 31 Vict., c. 127, § 12). Similarly, in Canada, the assents of the holders of three-fourths of the total claims

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[3] Section 75(g) requires acceptance by a majority in number of creditors holding a majority in amount of claims before the court may consider confirmation of a plan. Without such acceptance, dissenters are entitled to receive cash for the value of their interests [Section 75(s)].

[4] Section 83(d) requires that two-thirds of the claims of all classes must accept the plan in writing before it may be confirmed by the court.

[5] In each of these proceedings, two-thirds of each class of creditors must accept the plan in writing before the court can consider its confirmation [Section 77B(e); Section 179]. Dissenting classes are bound by a plan only if it provides for payment of the value of their interests in cash or there is a continued recognition of their old claims [Sections 77B(b)(5) and 77B(e); Section 216(7); *In re Granville & Winthrop Bldg. Corporation*, 87 F(2d) 101, 102, 103, Seventh Circuit; *In re Murel Holding Corporation*, 75 F(2d) 941, 942, Second Circuit].

[6] In these proceedings, acceptance of the plan by each class of creditors by a majority in number of creditors holding a majority in amount of claims is required before the court may consider confirmation of the plan [Sections 362, 468 and 652].

in each class must be secured (Canadian Act of 1919, c. 68, §§ 155-159; Rev. Stat. of Canada, 1927, c. 170).

The basis for this general requirement that creditors may be bound to a plan of reorganization only by the action of the holders of a majority, two-thirds, or three-fourths, of the claims of their class, was stated by the Supreme Court in the well known and frequently cited case of *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, as follows (pp. 534, 535, 536):

> "*In Gilfillan* v. *Canal Co.*, at the present Term, it was said that holders of bonds and other obligations issued by large corporations for sale in the market and secured by mortgages to trustees, or otherwise, have, by fair implication, certain contract relations with each other. In England, we infer, from what was said by Lord Cairns in *Cambrian Railways Company's Scheme, supra*, they are considered as in a sense part proprietors of the existing capital of the company, and dealt with by Parliament and the courts accordingly. They are not there, any more than here, corporators, and thus necessarily, in the absence of fraud or undue influence, bound by the will of the majority as to matters within the scope of the corporate powers, but they are interested in the administration of a trust which has been created for their common benefit. Ordinarily their ultimate security depends in a large degree on the success of the work in which the corporation is engaged, and it is not uncommon for differences of opinion to exist as to what ought to be done for the promotion of their mutual interests. In the absence of statutory authority or some provision in the instrument which establishes the trust, nothing can be done by a majority, however, large, which will bind a minority without their consent. Hence it seems to be eminently proper that where the legislative power exists, some statutory provision should be made for *binding*

the minority in a reasonable way *by the will of the majority.* * * *

"The confirmation and legalization of 'a scheme of arrangement' under such circumstances, is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, *if assented to by the required majority of creditors, is made binding on the non-assenting minority* * * *."

The "cram down" provision of Section 77 is therefore an important departure from all other reorganization procedures. It grants an unusual power to the district judge—a power which should be exercised by him only in the extraordinary situations in which such exercise becomes necessary to avoid a destruction of the interests of others.

The intent of those who sponsored the "cram down" amendment of 1935 is shown in the January 21, 1935 report of Joseph B. Eastman, Federal Coordinator of Transportation, which directly resulted in the introduction of the amendatory bill:

"Arbitrary compulsion of plans over the dissents of the interested classes is not intended, nor is it believed that the courts will override *strong dissents* by any large number of such classes, or by a single *large* class, excepting where it is established that they have no interest in the property. Rather, the purpose is to prevent the obstruction of plans which are favored by the larger classes of creditors or stockholders, but which are obstructed by *minorities* in the *smaller classes* in the attempt to secure unduly preferential treatment." (Emphasis supplied.)

The issue before the district judge was whether to confirm the plan in the fact of the rejection by approximately 76% of the owners of the Convertible 4½% Bonds and by 81% of the holders of the Little Rock & Hot Springs West-

ern Bonds. It is thus clear that the judge was not dealing with failures by small margins to get the necessary two-thirds vote of each class—not with a rejection by *small minorities* of these two classes of creditors—but with rejections by *large majorities* of each of these classes. It should also be borne in mind that the Convertible 4½% Debenture issue aggregates more than $32,000,000 in principal amount, and represented a total claim as of the date of the hearing, including interest, of approximately $50,000,000. Thus the district court was not dealing with a situation affecting only a *minority* of a *small issue.*

Section 77 recognizes the unusual nature of the "cram down" power granted to the judge and carefully safeguards its exercise. The judge "may" use the power only if he is convinced, beyond a reasonable doubt, that the rejection has been unreasonable, that the plan makes adequate provision for fair and equitable treatment for the interests of the rejecting classes, and that the plan is generally fair and equitable.

Even where the judge believes the necessary facts exist, he is not *required* to exercise his "cram down" power. The reason for this is clear. Findings as to the reasonableness of a rejection, as to whether certain classes of creditors have received fair and equitable treatment, and as to whether the plan is fair and equitable, "rest in the realm of judgment rather than mathematics", and "there is an area for disagreement" (*Milwaukee* case, 318 U. S. 523, 564). Recognizing this "area for disagreement", a conscientious judge, although personally convinced of the soundness of his own conclusions may nevertheless believe it equitable to submit the matter to the Commission for reconsideration. The statute gives him this discretion.

If the Commission with its broad and exclusive power to determine the values to be applied in testing the fairness of the plan, then reaffirms the old plan, no harm has been

done by its reconsideration except delay in the consummation of the plan.* On the other hand, application of the "cram down" provision would finally close the door to a further consideration of the plan; inequities in it would become irretrievably binding. To prevent this, the judge is given plenary discretion in his exercise of the "cram down" power.

The power to determine whether to "cram down" the plan upon dissenting classes of creditors or to refer the plan back to the Commission is conferred upon the judge alone. It is plain that if the district judge's refusal to confirm is appealable at all, the appellate court must refuse to disturb his determination unless it is wholly without warrant or rational basis.

In the *Milwaukee* case, 318 U. S. 523, in which the "cram down" provision was not in issue but merely the much more limited discretion of the district court in connection with "approval" of a plan, the Supreme Court nevertheless emphasized the special role of the district court as compared with the limited role of appellate courts, in the following terms (p. 564):

> "The District Court satisfied itself that the principles of priority as applied to these facts were respected. * * * Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under Section 77(e). Our role on review is a limited one. *It is not enough to reverse the District Court that we might have ap-*

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* In this case, such delay could clearly not be prejudicial since the current net earnings of the Rock Island available for the payment of interest are considerably in excess of the amount of interest accruing on all the old indebtedness. (See Tables, Appendix, *infra*, pp. 29-31.)

praised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end." (Emphasis supplied.) See also *New Haven* case, 147 F(2d) 40, 47 (C. C. A. 2d, 1945).

It is clear that the power of an appellate court in reviewing an order of the district court refusing to confirm a plan under the circumstances before the circuit court is even narrower than as stated in the foregoing quotation. It is doubtful whether, in the absence of a showing of bad faith, an appellate court would ever be justified in reversing a district court order which refuses to apply the "cram-down" provision. Certainly, the appellate court may not substitute its judgment for that of the district court. It must sustain the district court's order unless it finds that there is no rational basis in the record for the lower court's action.

There is a strong burden on the part of any party seeking reversal of an order refusing confirmation, when there has been an adverse class vote, to prove that there is no rational basis for doubt as to the equity of the plan or the unreasonableness of the class vote of rejection. Unless there is in the record evidence sufficient to demonstrate beyond a reasonable doubt, (1) that the plan is fair and equitable under present conditions and prospects, and (2) that the dissenting classes acted unreasonably in rejecting the plan, the district court had no power to confirm; its action in refusing confirmation under such circumstances is not subject to reversal by an appellate court.

As will hereinafter be shown, the record before the district court not only justifies the controversial order, but compelled the granting of it.

POINT II

Analysis of the two Denver decisions of the Supreme Court, 328 U. S. 495 and 329 U. S. 607.

The circuit court relied greatly upon the opinions of this Court in *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 and in *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607. Those cases, however, in so far as they are applicable, clearly support the contention of petitioner.

Neither the Supreme Court nor the circuit court of appeals in the Denver cases interfered with the plenary discretion of the district court in its application of the "cram-down" power.

The district court, in the *Denver* case, after receiving evidence and hearing the parties was "satisfied" that the plan was fair and equitable and that its rejection by one class of creditors has been unreasonable. It thereupon exercised its "cram-down" power by confirming the plan. Appeal was taken to the circuit court of appeals.

The controversy did not involve, as in this *Rock Island* case, the effect of changes in conditions after approval of the plan. As stated by the Supreme Court (328 U. S. 495, 534):

> "The challenge to the reasonableness or the unreasonableness of the rejection of the plan is *not based on any change of conditions* since its approval by the District Court October 25, 1943." (Emphasis supplied.)

The facts found by the district court were not challenged. The circuit court reversed the district court solely because, as a matter of law, it held that the plan was not fair and equitable, saying:

> "Under the *admitted facts* of the case, whether the plan complies with the requirement of Section 77, sub.

e, presents a pure *question of law,* and we are in no wise bound by the legal conclusions of the District Court in this respect. It is our conclusion that the plan fails to meet the requirements of Section 7, subd. e, in that it fails to make equitable distribution of the surplus cash and current assets on hand; fails to make equitable provisions for the distribution of the excess war profits which may reasonably be expected to accrue; fails to make equitable and fair distribution of that part of the capitalized value represented by the securities set aside for the Junction Bonds." *In re Denver & R. G. W. R. Co.,* 150 F. (2d) 28, 40. (Emphasis supplied.)

As stated by the Supreme Court (328 U. S. 495, 504):

"The reversal came from the Circuit Court's holding, contrary to the Commission and the District Court, that free cash in excess of operating capital needs and large earnings from war business after the date of the plan should be for the benefit of the General bondholders. 150 F. 2d 35-38. That court further held that decreases in debt by cash payments, with the consequent reduction of securities that were required to be issued under the plan to cover such debt claims, should inure to the benefit of the same General bondholders. 150 F. 2d 38-39. The Circuit Court disagreed also with the treatment of certain collateral deposited behind the First Consolidated Mortgage of the Rio Grande Western Railway Company and secondarily behind other issues of the debtor. This is the Utah Fuel stock issue hereinafter discussed. These differences from the conclusions of the District Court led the Circuit Court to hold that the General bondholders were 'reasonably justified' in rejecting the plan and that the District Court was without authority to confirm the plan over their veto. § 77(e)."

The Supreme Court overruled the holdings of the circuit court on the foregoing questions of law (328 U. S. 495, 534):

> "A rejection would not be reasonably justified unless the dissenters had a valid reason for their vote. As is shown by Judge Symes' discussion of their objections to confirmation, their reasons were the payment of the senior obligations with consequent claimed release of capitalization for junior securities and the inadequate valuation, particularly in view of the large additions to plants from earnings. We think that we have demonstrated that there was an adequate basis for the valuation, * * *, and that the decreases in senior debt were not for the account of the junior creditors. * * * *Respondents offer no other ground for their votes in rejection.*" (Emphasis supplied.)

The Court held that rejection is not reasonably justified if based *solely* on *legal grounds* which are not sound (328 U. S. 495, 535):

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If *only* those elements are relied upon, *as here*, the rejection is not reasonably justified." (Emphasis supplied.)

Mr. Justice Frankfurter dissented from the opinion of the Court on the ground that a rejection may be reasonable, under the unusual conditions which have prevailed in the railroad world during the past few years, even though based on specific grounds of law which are without validity.

No member of the Supreme Court, and no member of the circuit court, directly or indirectly indicated in the first *Denver* case that an appellate court has power to

reverse a finding of fact by the district court, which has material support in the record, that changed conditions make it equitable to send the plan back to the Commission for reconsideration. On the contrary, both circuit and Supreme Courts emphasized the limited power of appellate courts to review findings of fact of the district court—a power "only to ascertain whether the District Court performed its judicial functions under Subsection e, and whether its conclusions find support in the record":

> "On appeal, our scope of review is more limited than even that of the District Court. We inquire only to ascertain whether the District Court performed its judicial functions under Subsection e, and whether its conclusions find support in the record. *We may not reverse the District Court merely because we would have reached a different conclusion.* As stated by the Supreme Court, 'If there is warrant for the action of the District Court, our task on review is at an end'. *Group of Investors* v. *Milwaukee, supra.*" (150 F. (2d) 28, 36.) (Emphasis supplied.)
>
> "In view of the District Judge's familiarity with the reorganization, this finding has especial weight with us. See Rule 52, Federal Rules of Civil Procedure." (328 U. S. 495, 533.)

The applicable portion of Rule 52(a) of the Federal Rules of Civil Procedure, referred to in the foregoing statement of the Supreme Court, follows:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially * * * Findings of fact shall not be set aside *unless clearly erroneous* * * *." (Emphasis supplied.)

The issues presented to the circuit and Supreme Courts in the first *Denver* case were wholly different

from that presented herein to this Court. In that *Denver* case the courts were considering the circumstances under which an appellate court is warranted in reversing an exercise of the "cram-down" power by a district court, while in this case the problem is whether under any circumstances the district court can be *compelled* to exercise its "cram-down power" when it has *not* been "satisfied" that rejection of the plan was unreasonable, and if it may be compelled, the circumstances which would warrant such compulsion.

The statute requires that the district court must be "satisfied". If it is not satisfied, the statute makes no other provision for cramming the plan down upon dissenting classes of creditors. Such power is not given to appellate courts.

If there is *any* power to review the district court's conclusion that it is not "satisfied" that the rejection is unreasonable, the field of review must be much more restricted than the review of an exercise of the "cram-down power", as in the first *Denver* case.

Under the statute, failure of the district court to be "satisfied" is of itself sufficient to compel a reconsideration of the plan by the Commission. The burden of "satisfying" the court is upon those who seek to "cram down" the plan on the dissenting classes.

The second *Denver* case did not involve the "cram-down" provisions of the statute, but the right of a debtor to the reexamination of a reorganization plan *after* its confirmation. So far as applicable, the case sustains the contentions made herein by the petitioner. The district court's exercise of discretion was affirmed, and its reversal by Judge Phillips was set aside. The findings of fact of the district court, which Judge Phillips had apparently rejected, were adopted by the Supreme Court.

In the present *Rock Island* case, the circuit court has made no new findings of fact. It reversed the district court for its alleged "error of law" (160 F. 2d 942, 949) without showing the district court's findings of fact to be clearly erroneous, and has compelled confirmation of the plan, though the district court is not "satisfied" that the conditions prerequisite to use of the "cram-down power" exist in this case.

POINT III

The district court properly exercised its discretion in referring the plan to the Commission for reconsideration in the light of changed conditions.

Having determined that the district court must refer the plan to the Commission for reconsideration when it is not "satisfied" that rejection of the plan has been unreasonable, and that appellate courts cannot substitute their "satisfaction" for that of the district court by reviewing its order—or, at most, will review the district court order only to the limited extent of determining whether the district court's conclusion has any "support in the record"—the next, and final, inquiry must be whether the record is such as to have compelled the district court to find that changed conditions did not justify the order rejecting the plan and returning it to the Commission for reconsideration.

In the first *Denver* case, this Court expressly stated that the district court is not bound by its own previous approval of a plan as fair and equitable. "Reasons to make" a "rejection reasonable may arise thereafter" (328 U. S. 495, 535). The Court does not catalogue such reasons, but mentions "*unanticipated*, large earnings" as an illustration thereof. Taking these words in their context—and considering them in their relation to the entire opinion of the Court—it is apparent that the key word in this quotation is "unanticipated". Presumably, everything "antici-

pated" when the plan was approved is provided for in such plan. Only conditions not then anticipated—either because the facts did not then exist, were not then known, or their significance was not then understood—may be the basis of a reasonable rejection.

Attention should therefore be given not only to events which occurred after June 15, 1945, the date of the approval of the plan, but also to facts and events occurring before such date, if they were not then known, or if known, their significance was not then appreciated or could only be understood in the light of later developments.

In appraising the record before the district court, the narrowness of the field of review, if there is any power of review at all, of the appellate court must be kept in mind. The appellate court must not only find that there was no evidence from which the district court could reasonably reach any conclusion other than that the rejection was unreasonable and not warranted by the change in conditions, but in addition it must find that the evidence demonstrated conclusively such irreparable injury to senior interests from the exercise of the statutory discretion of the district court, without corresponding benefit to others, as compels this Court to find that the District Court abused the plenary discretion vested in it by the statute. It is not sufficient that the appellate court find that it might have reached conclusions different from that reached by the district court. If there is any evidence to support the district court, the appellate court is not justified in reversing.

The record is replete with evidence of important facts and events occurring after June 15, 1945, or then in existence but unknown to the Court, or of a significance not then appreciated—all indicating the equitable necessity of a reconsideration of the plan. There is no direct evidence showing irreparable injury to senior interests from the delay which will necessarily result from a reconsideration of the plan; no direct evidence showing that the rejection of the plan was unreasonable.

New Evidence before District Court:

In all the reports of the Commission and the opinions of the district court at and prior to the approval of the plan, both the Commission and court refused to regard the debtor's stupendous and unanticipated earnings during the war years as a favorable factor in determining the new capitalization of the debtor and the new securities available for distribution to creditors. In fact, the capitalization and outstanding securities were actually reduced from $368,000,000 to less than $330,000,000 as a direct result of these profits. It was stated that these profits were "war profits" which would not continue after the war ended, and that equally abnormal profits were being made by all railroads.

The fallacy of these statements clearly appears from an analysis of the figures, presented to the district court at the hearings on confirmation, of the debtor's earnings subsequent to the termination of the war with Japan (which occurred shortly after approval of the plan on June 15, 1945).

The first four months of 1946 were probably the worst in the history of American railroads: The railroads were charged with an enormous increase in salaries and wages, retroactive to January 1, 1946; no action had then been taken on their applications to the ICC for rate increases; the country's business was stagnant, and the movement of freight fell off considerably (R. 158). During that period the Class 1 railroads as a group—those having annual operating revenues of $1,000,000 or more—failed to earn interest on their outstanding obligations by the sum of $6,800,000. In sharp contrast, the Rock Island during that period, had earnings, after deduction of depreciation and amortization, of over 140 percent of all interest accruing on its total old indebtedness.* After deducting from the earnings of that four month period

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* See Table A, Appendix, *infra*, p. 29.

all interest accruing on obligations senior to the old Convertible Bonds, the remaining earnings were sufficient to pay the interest on these Convertibles (whose claims are recognized in the plan to the extent of only 17%) more than four and one-quarter times.* After deduction of Federal Income Taxes, depreciation, amortization, and interest on all the old obligations, including the Convertibles, the rate of earnings for the four month period were sufficient to yield the sum of $2,853,000 annually for dividends to the old stockholders, who are completely wiped out by the plan.* The earnings were more than three and one-half times the fixed and contingent interest of $1,594,040 accruing in the same period on all the securities authorized in the rejected plan.

The district court, when it refused to "cram down" the plan, not only had the foregoing facts before it for the first time as to earnings after the end of the war and after approval of the plan, but it was for the first time made aware of other material facts, revealed by the investigation of the railroad situation by the Senate Committee on Interstate and Foreign Commerce in Reports Nos. 925 and 1170, which were issued early in 1946. In Report No. 925, at page 52, the Committee revealed that the Commission had given it data which showed that the Rock Island earned during the pendency of its Section 77 proceeding (to December 31, 1944) sufficient to pay all accruing interest on its old indebtedness and leave $34,000,000 available for cash in the treasury, for reducing its outstanding bonded debt, and for additions and betterments. This surplus was increased to $42,934,096 by the end of April, 1946 (R. 157, 210).

All of the foregoing data, not previously known to the court, as to earnings before, during and after the war (including the first four months of 1946), was presented

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* See Table A, Appendix, *infra*, p. 29.

to the district court in June, 1946, and caused it to refuse to confirm the plan. Although also presented to the circuit court in the arguments and briefs of the debtor on the appeal, and again on its motion for a reargument, they were ignored by that court in its opinion of reversal.

Since the hearing on confirmation before the district court, the earnings of the Rock Island for the entire year 1946 and the first four months of 1947 have become known.

For the entire year 1946, the debtor's earnings available for the payment of interest were 165% of all interest accruing on the old indebtedness; interest on the old Convertibles was earned 6½ times; the earnings available for the old shares of stock were $4,293,156; and the fixed and contingent interest of $4,782,119 on the new bonds to be issued under the rejected plan was earned 4¼ times. (See Table B, Appendix, *infra*, p. 30.) These 1946 earnings are without the benefit of the increase in freight and passenger rates which became effective January 1, 1947.

During the first four months of this year, 1947, net income available for interest increased still further. During this period, the debtor's earnings available for the payment of interest were 209% of all interest accruing on old indebtedness; interest on the old Convertibles was earned more than 10¾ times; the earnings available for the old shares of stock were at the annual rate of $8,549,853; and the fixed and contingent interest of $1,594,040 on the new bonds to be issued under the rejected plan was earned 5½ times. (See Table C, Appendix, *infra*, p. 31.)

A consideration of the earnings of other railroads shows that the foregoing remarkable record of the Rock Island was made during an abnormally adverse period. If conditions do not improve, giants in the railroad field like the New York Central and Pennsylvania systems are headed for disaster. Yet, during this adverse period the Rock Island earned twice the so-called "normal" earnings of $11,000,000 (242 I. C. C. 298, 437) which were predicted by

the Commission and on which it based the rejected plan. What was anticipated by the Commission has not become actuality; what was unanticipated has indeed become fact.

The foregoing facts, of themselves, do not demonstrate beyond all doubt that the rejected plan is not fair, but it is equally clear that they do not demonstrate that the holders of the old Convertibles acted unreasonably in rejecting the plan and that the district court abused its discretion in refusing to "cram down" the plan and in sending it back to the Commission for further consideration.

Market price of new securities as a test of fairness of plan:

It has been contended in previous hearings on the rejected plan that the holders of the senior bonds are not being paid in full because, in the present depressed market, the value in the "when-issued" market of the securities allotted to them under the plan is less than the face amount of their old claims.

Messrs. Bourne and Bushby, attorneys for senior creditors herein, recently submitted to the House Judiciary Committee a printed table in which they listed the amounts of the claims of the holders of the old senior bonds and the values in the present "when issued" market of the securities allotted to them under the plan, to prove that adequate provision had not been made for them under the rejected plan (the inequities of which they strenuously urge should be perpetuated by confirmation). They did not, however, project their figures to show the ridiculous conclusion to which their figures lead—that the present "when issued" market appraises, upon the same basis, the total value of all the assets of the Rock Island Railroad at $80,000,000, excluding cash and government securities.

On the basis of the Bourne and Bushby figures, the total "when issued" market value of all the securities proposed

in the rejected plan is $164,000,000. If $84,000,000 (the cash and government securities which the Rock Island had on hand on April 28, 1947) are deducted from the over-all figure of $164,000,000, the conclusion is reached that the total value of the Rock Island Railroad, excluding cash and government securities, is approximately $80,000,000. (See Table D, Appendix, *infra*, p. 32.) Obviously, this value is ridiculous. The value of the road is at least five to six times this amount. In October, 1940, the Commission found the reproduction value of the Rock Island, less depreciation, to be $462,911,720 (242 I. C. C. 298, 430), and its value for rate making purposes to be $448,922,450 (242 I. C. C. 298, 430). For the purpose of the plan, at a time when there was little or no cash and no government bonds on hand, the Commission appraised the railroad as having a value of $368,000,000 for reorganization purposes (247 I. C. C. 533, 540).

On the basis of the Bourne and Bushby figures the holders of the Convertibles (the class which rejected the plan) receive only $4,000,000 under the plan in full payment for their claim of $53,605,907—a payment which is less than 50% of the earnings of $9,466,944 available for interest on such bonds for the year 1946 alone.

During 1946, the market value of the Rock Island General Mortgage 4% Bonds of 1988 fell from a high of 106⅛ to a low of 64, a fall of 40%, although its earnings *increased* during this period. The securities allotted under the plan to this class had a corresponding drop in the "when issued" market. Can it be seriously contended that the real value of the Rock Island assets fell 40% during this period?

Must a new plan be formulated whenever there is a rise or fall in the "when issued" market?

Conclusion

This Court in the *Denver* cases sustained the district court in the exercise of its discretion in the use of the "cram down" power; it reversed the circuit court for substituting its own discretion for that of the district court. Petitioner asks this Court to do the same thing here.

Section 77(e) grants a discretionary power, one which by the terms of the statute is permissive and not mandatory. The circuit court more than "proliferated the purpose" of Congress in *requiring* application of the "cram down" power to the Rock Island plan.

Earnings are the kernel of any reorganization. The petitioner herein has a demonstrable consistent earning power of more than double the estimate of the Commission. The district court believed that such unforeseen earning power permitted it to ask the Commission to "check its figures" before destroying millions in investments. The debtor asks no more than this.

Because the circuit court misconstrued the decisions of this Court in the *Denver* cases, misinterpreted Section 77(e) of the Bankruptcy Act, and wrongly decided a question of public importance in the administration of the Bankruptcy Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor-Petitioner.

JOHN GERDES,
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Counsel for Debtor-Petitioner.

New York, New York, July 2, 1947.

Appendix.

TABLE A

Earnings of Rock Island

January 1-April 30, 1946

(Figures taken from official reports of Trustees)

Earnings were 40% in excess of interest accruing on all old indebtedness:	
Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid) (R. 241)	$5,045,897.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid) (R. 241)	633,937.00
Total earnings available for interest on bonds	$5,679,834.00
Interest on all old bonds (R. 241)	4,094,992.00
Excess of earnings over interest requirements on old bonds	$1,584,842.00
Interest on old Convertible Bonds was earned 4¼ times:	
Total earnings available for interest on bonds	$5,679,834.00
Interest on all old bonds senior to old unsecured convertible 4½s	3,610,792.00
Available for interest on old unsecured convertible 4½s	$2,069,042.00
Interest on old unsecured convertible 4½s	$ 484,200.00
Amount earned for stockholders:	
Excess of earnings over interest requirements (from above)	$1,584,842.00
Deduction of federal income tax	633,937.00
Old stockholders' earnings for four months	$ 950,905.00
Annual rate of old stockholders' earnings	$2,852,715.00

TABLE B

Earnings of Rock Island

January 1-December 31, 1946

(Figures taken from official reports of Trustees)

Earnings were 65% in excess of interest accruing on all old indebtedness:

Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid)	$16,578,161.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	3,721,188.00
Total earnings available for interest on bonds	$20,299,349.00
Interest on all old bonds	12,285,005.00
Excess of earnings over interest requirements on old bonds	$ 8,014,344.00

Interest on old Convertible Bonds was earned 6½ times:

Total earnings available for interest on bonds	$20,299,349.00
Interest on all old bonds senior to old unsecured convertible 4½s	10,832,405.00
Available for interest on old unsecured convertible 4½s	$ 9,466,944.00
Interest on old unsecured convertible 4½s	$ 1,452,600.00

Amount earned for stockholders:

Excess of earnings over interest requirements (from above)	$ 8,014,344.00
Deduction of federal income tax	3,721,188.00
Amount available for dividends	$ 4,293,156.00

TABLE C

Earnings of Rock Island

January 1-April 30, 1947

(Figures taken from official reports of Trustees)

Earnings were 109% in excess of interest accruing on all old indebtedness:	
Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid)	$6,944,943.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	1,900,000.00
Total earnings available for interest on bonds	$8,844,943.00
Interest on all old bonds	4,094,992.00
Excess of earnings over interest requirements on old bonds	$4,749,951.00
Interest on old Convertible Bonds was earned 10¾ times:	
Total earnings available for interest on bonds	$8,844,943.00
Interest on all old bonds senior to old unsecured convertible 4½s	3,610,792.00
Available for interest on old unsecured convertible 4½s	$5,234,151.00
Interest on old unsecured convertible 4½s	$ 484,200.00
Amount earned for stockholders:	
Excess of earnings over interest requirements (from above)	$4,749,951.00
Deduction of federal income tax	1,900,000.00
Old stockholders' earnings for four months	$2,849,951.00
Annual rate of old stockholders' earnings	$8,549,853.00

TABLE D

Securities Allotted Under Rock Island Plan to Bondholders

Issue	Principal Amount	Amount of Claim, for $1000 bond; May 1, 1947	Market Price, per $1000 bond, of Allotment of "When Issued" Securities May 6, 1947	Percentage of Claim Satisfied by Allotment	Value of Total Claims on Basis of Present Market Prices
Equipment	$ 10,000,000	....	...	..	$ 10,000,000
C. & M.	3,524,000	....	...	..	3,524,000
Gen. Mtge.	61,581,000	$1,344	$829	62	51,000,000
First & Ref. Mtge.	104,470,000	1,452	521	36	54,000,000
Sec. 4½%	39,813,600	1,511	586	39	23,330,000
C. O. & G.	5,411,000	1,525	809	53	4,400,000
St. P. & K. C. S. L.	9,983,750	1,553	441	28	4,400,000
R. I. A. L.	11,000,000	1,519	561	37	6,170,000
B. C. R. & N.	11,000,000	1,648	349	21	3,839,000
L. R. & H. S. W.	453,600	509	330	65	150,000
Unsec. Con. 4½s	32,228,000	1,617	124.18	7.7	4,002,000
Gen'l Creditors	500,000	....	...	..	62,000
			Total		$164,877,000
			Less cash and gov't securities on hand		84,000,000
			Value of Rock Island on basis of market prices		$ 80,877,000

§ 24. *Jurisdiction of appellate courts.* * * * (c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

§ 77. *Reorganization of railroads engaged in interstate commerce.* * * * (e) *Court hearing after approval by Commission; acceptance of plan by creditors and stockholders; confirmation of plan by court; valuation of property.* Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring

the debtor's assets, for expenses and fees incident to the reorganizations, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the

judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided, further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is

required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided, further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his

conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.